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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

STEPHANIE FITZPATRICK,

Plaintiff and Appellant,

v.

JESSE ANDERSON et al.,

Defendants and Respondents.

A154059

(Mendocino County

Super. Ct. No. SCUK CVG 16-67716)

In this dispute between neighboring landowners, Stephanie Fitzpatrick (plaintiff) appeals from a summary judgment entered for Jesse and Donna V. Anderson (collectively, defendants). Plaintiff challenges the grant of summary judgment on her declaratory relief claim. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Notwithstanding plaintiff's failure to provide a proper statement of facts in her opening brief, we have gleaned the following:

Plaintiff and Donna V. Anderson own adjoining property in Mendocino County. After a "potential issue" arose regarding the boundary line—and the fencing separating the two properties—plaintiff filed a complaint against defendants.

Operative Complaint

The second amended complaint (complaint) alleged claims for breach of contract, fraud, specific performance, and declaratory relief.¹ The complaint alleged plaintiff noticed “irregularities in the fence” between the properties, prompting her to question whether the “fence . . . had been moved,” and to hire a surveyor to determine the “true” boundary line. The parties had conversations and exchanged emails about the property line. Plaintiff proposed moving the boundary line to “put the well house clearly on [the Anderson] property.” According to the complaint, defendants would pay to move a portion of the fence and to obtain a boundary line adjustment.

The breach of contract cause of action alleged defendants breached the written contract by failing to pay for the cost of moving the fence and by failing to obtain the boundary line adjustment. Plaintiff’s fraud claim alleged defendants promised to move the property line, and to pay for the fencing and boundary line adjustment, with no intention of performing. The cause of action for specific performance urged the court to enforce the parties’ written agreement, noting it “involved a trade of . . . equal quantity of land between the two parcels and thereby clarifying ownership of a well which was on the property of plaintiff but used by defendants.”

The declaratory relief claim alleged “an alternative cause of action in the event that the court determines that the contract alleged . . . is not enforceable,” specifically that there was an “actual controversy” regarding the boundary line. The complaint alleged plaintiff believed “the well used by defendants is located on her property. Defendants believe the well is located on their property. [¶] . . . As an alternative

¹ Plaintiff’s attorney verified the complaint. As relevant here, Code of Civil Procedure section 446 authorizes attorney verification “where the parties are absent from the county where counsel has his office,” and permits attorney verification on information and belief. (See *League of Women Voters v. Eu* (1992) 7 Cal.App.4th 649, 656.) An attorney-verified pleading “‘shall not . . . be considered as an affidavit or declaration establishing the facts therein alleged.’” (*Steele v. Totah* (1986) 180 Cal.App.3d 545, 551.) Further statutory references are to the Code of Civil Procedure.

remedy . . . plaintiff seeks a judicial declaration determining where the correct property line is actually located Plaintiff further requests that the court declare that the defendants have no right, title, or interest in the well located on the property of plaintiff and that they have no right to use the water therefrom.”

The complaint attached the grant deeds for the two properties, an assessor’s parcel map, and plaintiff’s surveyor’s map. The complaint also attached an email exchange between plaintiff and Jesse Anderson.

Motion for Summary Judgment and Opposition

Defendants moved for summary judgment. They argued plaintiff’s breach of contract, fraud, and specific performance claims failed because she could not establish the existence of a contract. As to the declaratory relief cause of action, defendants argued there was no “actual controversy” regarding the boundary line and, alternatively, that they had “an ownership interest in,” and “prescriptive rights to,” the well.

Defendants’ supporting declarations averred they discussed the fencing and boundary line with plaintiff, but did not reach a final agreement with her. Donna Anderson averred she purchased the property in 2003 and “[s]ince that time, the well that is situated on the property line” had been the “sole source of water” to her property, and that she had used the “well to supply water to the property openly and notoriously, since 2003.” Jesse Anderson’s declaration contained similar language. Surveyor Vance Ricks offered a supporting declaration attaching his survey of the Anderson property and averring a “well house . . . sits on the boundary line between” the two properties, “approximately 3.4 to 4 feet” on plaintiff’s property and “2 feet to 2.7 feet on the Anderson property.”

Defendants alleged six undisputed facts on the declaratory relief cause of action:

- (1) plaintiff owns real property;
- (2) Donna Anderson owns the adjoining property;
- (3) plaintiff’s grant deed states “the two parcels are described/defined in a parcel map that was recorded in September 1979”;
- (4) the well “situated on the property line between” the two properties “has been and is the sole source of water to the Anderson property”;
- (5) the “well house is situated on the boundary line” between the two properties and “sits

4’ on [plaintiff’s] property and 3’ on the Anderson property”; and (6) “[t]he Anderson property has used this well to supply water to the property, openly and notoriously, since 2003.”

Plaintiff opposed the motion.² As to the declaratory relief claim, she argued the summary judgment motion “lack[ed] sufficient evidentiary support.” Plaintiff, however, acknowledged that she did “not dispute Vance Ricks’[s] survey with respect to the location of the well and well house” and that the right to the water in the aquifer was “not an issue.” Plaintiff disputed only one fact pertaining to the declaratory relief cause of action: that the Anderson property had openly and notoriously used the well since 2003. She disputed this fact “to the extent that defendants’ claim for adverse possession is grounded in water law. Since there is no evidence of an overdraft to the aquifer, the assertion of open and notorious use fails. With respect to ground water the time for a prescriptive water right does not begin to accrue until the aquifer is depleted. Any claim for adverse possession based on occupancy of the land upon which the well is situated is not supported by a claim that the taxes were paid on the disputed land.”³

In a supporting declaration, plaintiff averred defendants “agreed, by email and orally, to move the boundaries between our respective properties consistent with” the map prepared by her surveyor and attached to the complaint. Plaintiff stated defendants “agreed to pay to construct the fence which was to be built running east and west between [the] properties” and that she “agreed to pay and paid for the fence running north and south between [the] properties.” Finally, plaintiff averred the allegations in the complaint

² Plaintiff also moved to amend the complaint to allege breach of an oral agreement. The court denied the motion.

³ “Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence.” (§ 437c, subd. (b)(3).) Plaintiff’s responsive statement failed to comply with this requirement, leaving the facts uncontroverted. (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 21–22.) “Failure to comply with this requirement” constitutes “a sufficient ground, in the court’s discretion, for granting the motion.” (§ 437c, subd. (b)(3); *Rush v. White Corp.* (2017) 13 Cal.App.5th 1086, 1088–1089.)

were “true and correct” and should “be used and considered for purposes of this summary judgment motion.”

Hearing and Order Granting Summary Judgment

At a hearing, the court observed plaintiff had not produced admissible evidence in opposition to the motion, nor “any facts to warrant denying the motion and finding that there is a material triable issue of fact.” As to the declaratory relief cause of action, the court observed the complaint “really has nothing to do with the water or the well; it’s about the fence and the boundary line. [¶] So . . . that may be a separate action all together.”

Following the hearing, the court granted the summary judgment motion. It determined plaintiff “failed to meet her burden to show by admissible evidence that a triable issue of fact exists. There is no evidence of a valid written or oral agreement as to the property boundary line or resolution of same. It is clear that there was never a meeting of the minds Plaintiff’s declaration submitted in opposition to the [m]otion . . . is woefully inadequate as it lacks any specificity as to either a written or oral agreement. Also no evidence was submitted by Plaintiff demonstrating that there is a triable issue of fact which would support a claim for fraud. Plaintiff’s motion to amend the complaint is denied on the grounds that no amendment would cure the defects raised by Defendants.”

The court entered judgment for defendants.

DISCUSSION

Plaintiff challenges the grant of summary judgment on her declaratory relief claim.⁴ “Although our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in [the opening] brief” (*Reyes v.*

⁴ Plaintiff acknowledges the declaratory relief claim “is poorly drafted” and states she will amend her complaint—for a third time—to state a new claim for encroachment. We decline to consider this argument for the first time on appeal. Permitting a change of theory on appeal from the grant of a summary judgment would be “manifestly unjust to the opposing parties, unfair to the trial court, and contrary to judicial economy.” (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29.)

Kosha (1998) 65 Cal.App.4th 451, 466, fn. 6) and “it is appellant’s burden to affirmatively show error,” i.e., to “present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error.” (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

Plaintiff’s opening brief does not satisfy this burden. Her “factual summary” is taken solely from the attorney-verified complaint, which is not “ ‘an affidavit or declaration establishing the facts therein alleged.’ ” (*Steele v. Totah, supra*, 180 Cal.App.3d at p. 551.) Plaintiff does not describe defendants’ summary judgment motion, the declarations submitted in support of that motion, or defendants’ separate statement of material facts. The “procedural history” section of the brief does not mention the opposition to the summary judgment motion, let alone describe that opposition.

The argument section of plaintiff’s opening brief is equally deficient. Plaintiff does not address the elements of a claim for declaratory relief. She summarily states our review is de novo, without explaining the three-step analysis we use to evaluate the lower court’s ruling. (See *Choi v. Sagemark Consulting* (2017) 18 Cal.App.5th 308, 318.) Most importantly, plaintiff makes no effort to explain how she alleged a viable declaratory relief claim, or to demonstrate how she established a triable issue of material fact on that claim. The “arguments” in plaintiff’s opening brief are largely conclusory and irrelevant; her reply brief is only marginally better. We conclude plaintiff has forfeited her arguments on appeal. (*Proctor v. Vishay Intertechnology, Inc.* (2013) 213 Cal.App.4th 1258, 1273, 1274; *People v. Stanley* (1995) 10 Cal.4th 764, 793.) We express no opinion on the parties’ arguments regarding adverse possession and prescriptive water rights.

DISPOSITION

The judgment is affirmed. Defendants are entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

Jones, P.J.

WE CONCUR:

Simons, J.

Needham, J.

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